91-1010

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,

Petitioner,

v.

METCALF & EDDY, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In departing from the decisions of six federal courts of appeals, did the Court of Appeals for the First Circuit err in holding that it lacked jurisdiction under 28 U.S.C. § 1291 to review interlocutory orders denying claims of Eleventh Amendment immunity from suit as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	2
RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	3
STATEMENT OF THE CASE	3
A. The Parties and Their Contract	4
B. The Background of the Parties' Contractual Dispute	5
C. The Authority Asserts Its Eleventh Amendment Claim	5
D. The District Court Denies the Authority's Claim	7
E. The First Circuit Dismisses the Appeal	8
REASONS FOR GRANTING THE WRIT	9
I. THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF SIX UNITED STATES COURTS OF APPEALS	10
A. The Eleventh Amendment Prohibits Lawsuits Against States	10
B. Six Courts of Appeals Have Held that Orders Denying Claims to Eleventh Amendment Immunity are Immediately Appealable Because they Implicate an "Entitlement Not to Stand Trial"	11
C. Common Rationale of the Six Courts of Appeals	12

TABLE OF CONTENTS—*(Continued)*

	Page
D. The First Circuit's Decision Conflicts with the Six Courts of Appeals in its Reasoning and its Result	14
1. The First Circuit Rejected the View that the Eleventh Amendment Grants an "Entitlement Not to Stand Trial"	14
2. The Conflict Between the Circuits Exists Because the First Circuit Views *Libby* As Controlling	15
II. THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT	17
A. The First Circuit's View of the Eleventh Amendment Conflicts with Decisions of this Court Construing the Eleventh Amendment	17
B. The First Circuit's Judgment Conflicts with Decisions of this Court Holding that *Ex Parte Young* did not Abridge the Eleventh Amendment	18
C. The First Circuit's Decision Conflicts with this Court's Decisions Differentiating Between Immunity from Suit and Immunity from Liability	19
D. The Decision of the First Circuit Conflicts with Decisions of this Court Construing the History and Purpose of the Amendment	21

Page

III. THIS APPEAL PRESENTS FEDERALISM QUESTIONS OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE 22

SUGGESTION FOR SUMMARY DISPOSITION . 24

CONCLUSION 25

APPENDICES:

A. Order of the United States Court of Appeals for the First Circuit (Sept. 25, 1991) A-1

B. Order of the United States District Court for the District of Puerto Rico (May 17, 1991) A-9

C. Order of the United States Court of Appeals for the First Circuit (June 28, 1991) A-11

Cases: Page

Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Company of Puerto Rico, 818 F.2d 1034 (1st Cir. 1987) 6, 7

Alabama v. Pugh, 438 U.S. 781 (1978) 18, 19, 24

American Fire & Casualty Co. v. Finn, 341 U.S. 6 (1951) 24

Blatchford v. Native Village of Noatak, 111 S. Ct. 2578 (1991) 18, 22

Canadian Transp. Co. v. Puerto Rico Ports Auth., 333 F. Supp. 1295 (D.P.R. 1971) 7

Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) .. 21

Chrissy F. v. Mississippi Dep't of Pub. Welfare, 925 F.2d 844 (5th Cir. 1991) 11

Coakley v. Welch, 877 F.2d 304 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989) 11, 12

Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541 (1949) 9, 11, 12, 13, 15

Coopers & Lybrand v. Livesay, 437 U.S. 463 (1978) 13

Corporate Risk Management Corp. v.. Solomon, Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub. nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766) 11, 12

Cory v. White, 457 U.S. 85 (1982) 22

Dellmuth v. Muth, 491 U.S. 223 (1989) 17, 23

Dube v. State Univ., 900 F.2d 587 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991) 11

Edelman v. Jordan, 415 U.S. 651 (1974) 22, 23

Cases: Page

Employees v. Missouri Dep't of Pub. Health & Welfare, 411 U.S. 279 (1973)..... 21

Eng v. Coughlin, 858 F.2d 889 (2d Cir. 1988)..... 11

Ex Parte Young, 209 U.S. 123 (1908) .. 15, 16, 18, 19

Ex Parte State of New York, 256 U.S. 490 (1921) 10

Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147 (1981)..... 20, 24

Florida Dep't of State v. Treasure Salvors, Inc., 458 U.S. 670 (1982)..... 18, 20

Great N. Life Ins. Co. v. Read, 322 U.S. 47 (1944) 20

Green v. Mansour, 474 U.S. 64 (1985) 15, 19

Hafer v. Melo, 112 S. Ct. 358 (1991)..... 17

Hoffman v. Connecticut Dep't of Income Maintenance, 492 U.S. 96 (1989)..... 17

Howlett v. Rose, 110 S. Ct. 2430 (1990)..... 17

In re San Juan DuPont Plaza Hotel Fire Litig., 888 F.2d 940 (1st Cir. 1989) 7

Kroll v. Board of Trustees, 934 F.2d 904 (7th Cir.), *cert. denied*, 116 L.Ed.2d 329 (1991)..... 12, 13

Lane v. First Nat'l Bank, 871 F.2d 166 (1st Cir. 1989) 16

Lauro Lines S.R.L. v. Chasser, 490 U.S. 495 (1989)..... 2, 13, 19, 20

Libby v. Marshall, 833 F.2d 402 (1st Cir. 1987). 8, 14, 15, 16, 18, 22

Loya v. Texas Dep't of Corrections, 878 F.2d 860 (5th Cir. 1989)..... 11, 12

Cases: Page

Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth., 945 F.2d 10 (1st Cir. 1991).. 1, 6, 8, 9, 14, 15, 16, 22

Midland Asphalt Corp. v. United States, 489 U.S. 794 (1989)..... 2, 13

Minotti v. Lensink, 798 F.2d 607 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987) 11, 12

Mitchell v. Forsyth, 472 U.S. 511 (1985) .. 11, 12, 13, 14, 20

Nixon v. Fitzgerald, 457 U.S. 731 (1982)..... 12

Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth., 744 F.2d 880 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985)..... 6, 7, 8

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89 (1984) 10, 18, 19 20, 23

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 17

Port Auth. Trans-Hudson v. Feeney, 110 S. Ct. 1868 (1990) 18

Puerto Rico Ports Auth. v. M/V Manhattan Prince, 897 F.2d 1 (1st Cir. 1990) 7

Ramirez v. Puerto Rico Fire Serv., 715 F.2d 694 (1st Cir. 1983)..... 6, 16

Schopler v. Bliss, 903 F.2d 1373 (11th Cir. 1990).12, 13

United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) 24

United States v. Yonkers Bd. of Educ., 893 F.2d 498 (2d Cir. 1990) 11

Van Cauwenberghe v. Biard, 486 U.S. 517 (1988) .. 2, 13, 20

Cases: Page

Welch v. Texas Dep't of Highways & Pub. Transp., 483 U.S. 468 (1987) 18, 21, 22, 23, 24

Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989) 23

Statutes:

28 U.S.C. § 1332(a)(1) 2

28 U.S.C. § 1291 ..... 2, 3, 11

28 U.S.C. § 1292(b) 2

28 U.S.C. § 1254(1) 2

42 U.S.C. § 1983 15

P.R. Laws Ann. tit. 22, § 142 4

P.R. Laws Ann. tit. 22, § 144(c) 20

Miscellaneous:

U.S. Const. amend. XI ..... 3, *passim*

Fed. R. Civ. P. 13(a) 8

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METCALF & EDDY, INC.,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

The Petitioner, the Puerto Rico Aqueduct and Sewer Authority, respectfully requests this Court to issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this action on September 25, 1991.

OPINIONS BELOW

The decision of the Court of Appeals for the First Circuit holding that interlocutory orders denying Eleventh Amendment immunity claims are not immediately appealable as collateral final orders and dismissing the Petitioner's appeal for want of appellate jurisdiction is reported as *Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10 (1st Cir. 1991). This decision is reprinted in Pet. App. A.

The order of the United States District Court for the District of Puerto Rico (Pieras, J.) denying the Petitioner's claim to Eleventh Amendment immunity from suit in federal court is not reported. It is reprinted in Pet. App. B.

JURISDICTION

The Respondent and Plaintiff below, Metcalf & Eddy, Inc., asserted diversity of the parties and satisfaction of the jurisdictional amount under 28 U.S.C. § 1332(a)(1) as the sole basis for the district court's jurisdiction over the action below.

After the district court denied the Petitioner's motion to dismiss based upon Eleventh Amendment immunity from suit, the Petitioner and Defendant below, the Puerto Rico Aqueduct and Sewer Authority, appealed the order to the United States Court of Appeals for the First Circuit as a collateral final order under 28 U.S.C. § 1291. The Petitioner did not seek to certify the question for appeal under 28 U.S.C. § 1292(b). On September 25, 1991, the court of appeals entered judgment dismissing the appeal for want of jurisdiction. The Authority did not seek a rehearing.

This Court has jurisdiction to review the decision of the court of appeals under 28 U.S.C. § 1254(1).[1]

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1. This Court has authority to determine whether classes of orders denying motions to dismiss are immediately appealable as collateral final orders, irrespective of the interlocutory status of the particular order being appealed. *See Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495 (1989) (interlocutory orders denying motions to dismiss based on forum selection clauses not collateral final orders); *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989) (interlocutory orders denying motions to dismiss based on violations of Fed. R. Crim. P. 6(c) not collateral final orders); *Van Cauwenberghe v. Biard*, 486 U.S. 517 (1988) (interlocutory orders denying motions to dismiss based on immunity from civil process and *forum non conveniens* not collateral final orders).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XI.

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

28 U.S.C. § 1291. Final decisions of district courts.

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

STATEMENT OF THE CASE

The case below is a breach of contract action based on diversity jurisdiction. In the ongoing action in the district court, the Respondent and Plaintiff, Metcalf & Eddy, Inc. ("M&E"), a Delaware corporation, is seeking a declaration of the parties' contractual rights and monetary damages in excess of $50 million from the Petitioner and Defendant, the Puerto Rico Aqueduct and Sewer Authority ("the Authority"). There are no federal claims in the case. The substantive law of Puerto Rico applies.

A. The Parties and Their Contract.

The Puerto Rico Aqueduct and Sewer Authority is a public corporation[2] and "an autonomous government instrumentality of the Commonwealth of Puerto Rico." P.R. Laws Ann. tit. 22, § 142. The Authority provides drinking water and treats wastewater throughout Puerto Rico, a function which the Commonwealth of Puerto Rico has declared "shall be deemed and held to be an essential government function." *Id.*

As the government entity responsible for island-wide compliance with Clean Water Act standards, the Authority has been the defendant in a lengthy Clean Water Act enforcement action brought by the United States Environmental Protection Agency. Under a comprehensive consent decree entered in 1985, the Authority agreed to upgrade many of its wastewater treatment plants. In 1986, the Authority signed a contract with M&E, a private engineering firm, in which M&E agreed to direct, supervise, and manage a program to repair and rehabilitate the Authority's facilities to comply with the consent decree. Between 1986 and 1991, M&E and its subsidiary, Metcalf & Eddy de Puerto Rico, Inc.,[3] billed the Authority well over $180 million under the contract.

2. The Authority has no parent companies or subsidiary companies.

3. M&E incorporated Metcalf & Eddy de Puerto Rico, Inc., in 1989. The main place of business of the subsidiary is Puerto Rico. M&E sought (but now claims that it never obtained) the Authority's consent to assign their contract to its subsidiary in 1989. Nonetheless, M&E informed all of its subcontractors that their contracts to perform services for the Authority had been assigned from M&E to the subsidiary and M&E transferred the M&E employees who had been working on the contract to the subsidiary's payroll. From November 1989 onward, the Authority was billed for services performed by the subsidiary.

B. The Background of the Parties' Contractual Dispute.

To answer questions about the invoices submitted under the contract, in early 1990 the Authority requested the Puerto Rico Infrastructure Financing Authority, an affiliate of the Government Development Bank of Puerto Rico (the "GDB"), to audit the invoices that M&E and its subsidiary had submitted. The GDB found numerous improper billings and unapproved expenses in the invoices. In its final audit report, the GDB determined that M&E and its subsidiary had billed the Authority $18,849,219.36 in actual questioned costs in 61 intensively audited invoices. Using statistical sampling and projection techniques, the GDB concluded that the companies had overbilled the Authority by as much as $39,988,260 in such costs in the 2,219 invoices submitted through 1989.[4]

Pending a resolution of its concerns, the Authority withheld partial payments to M&E and its subsidiary. The Authority sent M&E a draft of the GDB audit report in August 1990. Six weeks later, M&E filed suit against the Authority in the United States District Court for the District of Puerto Rico alleging breach of contract and damage to its business reputation.

C. The Authority Asserts Its Eleventh Amendment Claim.

On February 26, 1991, the Authority filed the motion that gave rise to this appeal: a motion to dismiss based on its immunity from suit under the Eleventh Amendment to the United States Constitution.[5] In its

4. The GDB neither audited nor projected questioned costs in the approximately 1000 invoices that M&E and its subsidiary submitted to the Authority since 1989.

5. The Authority initially filed a motion to dismiss based upon a lack of diversity jurisdiction. In its original motion, the Authority argued that the assignment of the contract to M&E's subsidiary rendered the subsidiary an indispensable party. Because the main

motion, the Authority argued that as an "arm of the State" of Puerto Rico under the First Circuit's test in *Ainsworth Aristocrat Int'l Pty., Ltd. v. Tourism Co. of Puerto Rico*, 818 F.2d 1034, 1037 (1st Cir. 1987) (seven factor "arm of the State" test), it is immune from suit in federal court.[6]

In response, M&E argued that the First Circuit had already decided that the Authority did not enjoy Eleventh Amendment immunity, citing *Paul N. Howard Co. v. Puerto Rico Aqueduct & Sewer Auth.*, 744 F.2d 880 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), and, in the alternative, argued that the Authority was not entitled to the protection of the Eleventh Amendment under the First Circuit's "arm of the state" test.[7]

NOTES *(Continued)*

place of business of Metcalf & Eddy de Puerto Rico, Inc., is Puerto Rico, its presence as a party would have destroyed diversity jurisdiction. In response, M&E argued that the assignment never took place and executed a document purporting to reassign all rights to payment under the contract from the subsidiary back to M&E. The district court denied the Authority's first motion to dismiss on February 13, 1991. The Authority filed a motion for Reconsideration, which was consolidated with the motion to dismiss based upon the Eleventh Amendment.

6. Within the First Circuit, the Commonwealth of Puerto Rico is treated as a state under the Eleventh Amendment. *Ramirez v. Puerto Rico Fire Serv.*, 715 F.2d 694, 697 (1st Cir. 1983) ("Puerto Rico, despite the lack of formal statehood, enjoys the shelter of the Eleventh Amendment in all respects."); *see also Metcalf & Eddy, Inc. v. Puerto Rico Aqueduct & Sewer Auth.*, 945 F.2d 10, 11 n.1 (1st Cir. 1991). Although immune from suit in the federal courts, the Authority invited M&E to refile the lawsuit in the courts of the Commonwealth of Puerto Rico, which the Authority acknowledges would have jurisdiction over the suit.

7. In *Paul N. Howard*, the First Circuit ruled that the Authority waived its right to claim Eleventh Amendment immunity from suit by filing counterclaims in the district court. 744 F.2d at 886. Thus, the court did not reach the merits of the Authority's claim to Eleventh Amendment immunity. In *dictum*, however, the First Circuit surmised that the Authority would not be entitled to Eleventh Amendment immunity, but specifically left the question open pending a substantive analysis. *Id.*

Approximately three years after deciding *Paul N. Howard*, the First Circuit adopted the substantive test for evaluating "arms of the state" in *Ainsworth*. Although the First Circuit has not yet applied this test to the Authority, it has applied this test to other autonomous government instrumentalities of Puerto Rico. The First Circuit has held that both the Puerto Rico Tourist Company, *In re San Juan DuPont Plaza Hotel Fire Litig.*, 888 F.2d 940 (1st Cir. 1989), and the Puerto Rico Ports Authority, *Puerto Rico Ports Auth. v. M/V Manhattan Prince*, 897 F.2d 1 (1st Cir. 1990), are "arms of the state" which enjoy immunity from suit under the Eleventh Amendment. In its motion to dismiss, the Authority demonstrated that it is indistinguishable from these entities.[8]

D. The District Court Denies the Authority's Claim.

On May 17, 1990, the district court denied the Authority's motion to dismiss and ordered the Authority to answer the complaint. Pet. App. B. The Authority filed a timely notice of appeal with respect to the denial of its claim to Eleventh Amendment immunity from suit.

While the appeal was pending, the Authority sought to stay the district court proceedings to avoid waiving either its claim to Eleventh Amendment immunity or its counterclaims.[9] The First Circuit denied the Authority's

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8. Until the First Circuit applied its new *Ainsworth* test to the Tourism Company and the Ports Authority, the federal courts had declined to hold that they were "arms of the state" under the Eleventh Amendment. *See Ainsworth*, 818 F.2d at 1038 (test factors "point toward the conclusion that the Tourism Company is not an arm of the state"); *Canadian Transp. Co. v. Puerto Rico Ports Auth.*, 333 F. Supp.1295 (D.P.R. 1971) (Ports Authority not immune under Eleventh Amendment).

9. The lawsuit initially had placed the Authority in a procedural dilemma: the Authority could assert Eleventh Amendment immunity from the suit, or it could answer the complaint and assert counterclaims based on the millions of dollars in improper billings, but it could not do both. If, on one hand, it answered the complaint

motion for a stay, but held that the Authority had preserved its claim to Eleventh Amendment immunity in the case irrespective of whether it filed counterclaims or participated in the action below. Order (June 28, 1991), reprinted at Pet. App. C.

The Authority filed its answer and counterclaims, and has since participated in the proceedings below to the extent ordered to do so by the district court. Substantial discovery is ongoing and trial is set for May 18, 1992.

E. The First Circuit Dismisses the Appeal.

On September 25, 1991, the Court of Appeals for the First Circuit entered judgment dismissing the Authority's appeal for want of appellate jurisdiction. *Metcalf & Eddy, Inc.*, 945 F.2d at 14. Holding that *stare decisis* required it to follow *Libby v. Marshall*, 833 F.2d 402 (1st Cir. 1987), the First Circuit held that the Eleventh Amendment does not provide states or state entities with an "entitlement not to stand trial" in the federal courts. *Id.* at 11 n.3, 12 (citing *Libby*, 833 F.2d at 404-05, 407). The First Circuit held that the Eleventh Amendment only protects state treasuries against the enforcement of monetary judgments, an interest that " 'can be adequately vindicated upon an appeal from a final judgment. . . .' " *Id.* at 12 (quoting *Libby*, 833 F.2d at 407).

Explicitly acknowledging that its decision conflicted with the decisions of four (now six) United States Courts of Appeals, *id.* at 13 (citing conflicting cases), the court held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are not appealable

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NOTES *(Continued)*

and filed counterclaims, it would have waived its claim to Eleventh Amendment immunity under *Paul N. Howard*, 744 F.2d at 886. If, on the other hand, the Authority claimed Eleventh Amendment immunity and answered the complaint without asserting its compulsory counterclaims, it could have waived its counterclaims under Fed. R. Civ. P. 13(a) – a financial risk inconsistent with its public obligations as an instrumentality of the government.

as collateral final orders under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). *Metcalf & Eddy, Inc.*, 945 F.2d at 11-12. The court declined to reach the merits of the Authority's appeal.

This appeal followed.

REASONS FOR GRANTING THE WRIT

1. The decision of the United States Court of Appeals for the First Circuit directly conflicts with decisions of six other United States courts of appeals. The courts of appeals have acknowledged the conflict, which is now ripe for resolution by clear direction from this Court.

2. The First Circuit's decision directly conflicts with applicable decisions of this Court. The First Circuit erred by holding that the Eleventh Amendment does not provide states and state entities with an "entitlement not to stand trial." This holding is in direct conflict with decisions of this Court that the amendment absolutely bars the federal courts from exercising jurisdiction over unconsenting states and state entities in actions brought by private parties.

3. The decision of the First Circuit implicates federalism concerns of fundamental importance. By holding that trial must precede appellate review of a claim to Eleventh Amendment immunity, the First Circuit has expanded the jurisdiction of the federal district courts over the states, calling into question the extent and nature of state sovereign immunity within the federal system.

Neither the states' rights under the Eleventh Amendment nor the role of the federal courts in vindicating those rights should vary between the circuits. This Court should grant the petition and resolve the conflict by correcting the error of the First Circuit.

I.
THE DECISION OF THE FIRST CIRCUIT CONFLICTS WITH DECISIONS OF SIX UNITED STATES COURTS OF APPEALS

The United States courts of appeals have rendered conflicting decisions as to whether interlocutory orders denying claims to Eleventh Amendment immunity from suit are immediately appealable as collateral final orders. The essence of the conflict is a disagreement over whether Eleventh Amendment immunity from suit in federal court is an "entitlement not to stand trial."

A. The Eleventh Amendment Prohibits Lawsuits Against States.

The Eleventh Amendment is an explicit limitation on the federal judicial power established in Article III of the Constitution. Characterizing the right enjoyed by the states and their agencies under the Eleventh Amendment as an "immunity from suit," this Court has repeatedly held that the Eleventh Amendment prohibits the federal courts from exercising jurisdiction over lawsuits brought by private parties against states and their agencies without their consent:

> That a State may not be sued without its consent is a fundamental rule of jurisprudence having so important a bearing upon the construction of the Constitution of the United States that it has become established by repeated decisions of this court that the entire judicial power granted by the Constitution does not embrace authority to entertain a suit brought by private parties against a State without consent given. . . .

Pennhurst State School & Hosp. v. Halderman, 465 U.S. 89, 98 (1984) (quoting *Ex Parte New York*, 256 U.S. 490, 497 (1921)).

B. Six Courts of Appeals Have Held that Orders Denying Claims to Eleventh Amendment Immunity are Immediately Appealable Because they Implicate an "Entitlement Not to Stand Trial".

Six courts of appeals have recognized that claims to Eleventh Amendment immunity from suit are claims to an "entitlement not to stand trial." Because an "entitlement not to stand trial" is effectively lost if an erroneous trial occurs, *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985), an order denying a claim to such a right may be appealed immediately under 28 U.S.C. § 1291 as a collateral final order under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).[10] *Id.*

The six courts that have held that interlocutory orders denying claims to Eleventh Amendment immunity from suit are immediately appealable are the Court of Appeals for the Second Circuit, *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987); *see also Dube v. State Univ.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 482 U.S. 906 (1991); *United States v. Yonkers Bd. of Educ.*, 893 F.2d 498, 502-03 (2d Cir. 1990); *Eng v. Coughlin*, 858 F.2d 889, 894 (2d Cir. 1988); the Court of Appeals for the Fourth Circuit, *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 493 U.S. 976 (1989); the Court of Appeals for the Fifth Circuit, *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *see also Chrissy F. v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844 (5th Cir. 1991); the Court of Appeals for the Sixth Circuit, *Corporate Risk Management Corp. v. Solomon*,

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10. In *Cohen*, 337 U.S. at 546, this Court held that a small class of pre-judgment orders may be appealed immediately to the courts of appeals as collateral final orders under 28 U.S.C. § 1291. These orders must "finally determine" claims of rights that are separable from, and are collateral to the rights asserted in the action, and that are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.*

Nos. 90-1713, 90-1730, 1991 U.S. App. LEXIS 15001 (6th Cir. July 2, 1991), *petition for cert. filed on other grounds sub nom. Coleman v. Corporate Risk Management Corp.*, 60 U.S.L.W. 3388 (U.S. Nov. 26, 1991) (No. 91-766); the Court of Appeals for the Seventh Circuit, *Kroll v. Board of Trustees*, 934 F.2d 904, 906 (7th Cir.), *cert. denied*, 116 L.Ed.2d 329 (1991); and the Court of Appeals for the Eleventh Circuit, *Schopler v. Bliss*, 903 F.2d 1373 (11th Cir. 1990) (per curiam).

C. Common Rationale of the Six Courts of Appeals.

The six courts of appeals that have accepted appellate jurisdiction over interlocutory orders denying claims to Eleventh Amendment immunity followed the rationale that this Court used in allowing immediate appeals from orders denying claims to "absolute" or "qualified" immunity.[11] This Court held that an order denying a claim to either "absolute" or "qualified" immunity is an appealable final order under *Cohen* because the essence of the claim is an "entitlement not to stand trial," a right which is finally and irretrievably lost if an erroneous trial occurs. *Mitchell*, 472 U.S. at 526 (denial of claim to "qualified" immunity appealable as collateral final order); *Nixon v. Fitzgerald*, 457 U.S. 731, 743 (1982) (order denying claim to "absolute" immunity immediately appealable as collateral final order).

Thus, the six courts of appeals held that orders denying claims to Eleventh Amendment immunity are immediately appealable as collateral final orders under *Cohen* because the essence of the claimed right to Eleventh Amendment immunity from suit is an entitlement not to stand trial. *See Minotti*, 798 F.2d at 608-09; *Coakley*, 877 F.2d at 305-06; *Loya*, 878 F.2d at 861; *Corporate Risk Management Corp.*, 1991 U.S. App.

11. "Absolute" and "qualifed" immunity protect government officers against suits that otherwise would impose liability for certain official actions.

LEXIS 15001 at *4; *Kroll*, 934 F.2d at 906-07; *Schopler*, 903 F.2d at 1377-78.

The conclusion of the six courts of appeals that an "immunity from suit" (such as that provided by the Eleventh Amendment) is an "entitlement not to stand trial" is supported by this Court's statement in *Mitchell* showing that the two are synonymous:

> At the heart of the issue before us is the question whether qualified immunity shares this essential attribute of absolute immunity – whether qualified immunity is in fact an entitlement not to stand trial under certain circumstances.
>
> . . .
>
> The entitlement is an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial.

Mitchell, 472 U.S. at 525, 526 (emphasis in original).

The rationale of the six courts of appeals is also supported by this Court's recognition that the *Cohen* test is satisfied whenever an interlocutory order denies a claim to a "right not to be tried" that is based on the Constitution:

> It is true that deprivation of the right not to be tried satisfies the *Coopers & Lybrand [v. Livesay*, 437 U.S. 463 (1978)] requirement of being 'effectively unreviewable on appeal from a final judgment.' . . . A right not to be tried in the sense relevant to the *Cohen* exception rests upon an explicit statutory or constitutional guarantee that trial will not occur – as in the Double Jeopardy Clause . . . or the Speech and Debate Clause . . . .

Midland Asphalt Corp. v. United States, 489 U.S. 794, 800-01 (1989) (citations omitted); *see also Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 522 (1988).

D. The First Circuit's Decision Conflicts with the Six Courts of Appeals in its Reasoning and its Result.

In contrast to the six courts of appeals, only the First Circuit has held that Eleventh Amendment immunity from suit is not an "entitlement not to stand trial." Accordingly, only the First Circuit has held that it thus lacks jurisdiction to review interlocutory orders denying claims to Eleventh Amendment immunity from suit. *Metcalf & Eddy, Inc.*, 945 F.2d 10; *Libby*, 833 F.2d 402. The First Circuit deviated from its sister circuits both in its rationale and in the result.

1. The First Circuit Rejected the View that the Eleventh Amendment Grants an "Entitlement Not to Stand Trial".

In dismissing the Authority's appeal, the First Circuit cited as controlling precedent an earlier decision that explicitly rejected the view that the Eleventh Amendment grants states and state entities an "entitlement not to stand trial:"

> We reject the proposition that the Eleventh Amendment passes the *Mitchell* litmus test, i.e., that a state's sovereign immunity is in fact an entitlement not to stand trial.

Libby, 833 F.2d at 405 *cited in Metcalf & Eddy, Inc.*, 945 F.2d at 11-12.

In *Libby*, the First Circuit held – without citing any supporting authority whatsoever – that the Eleventh Amendment only protects a state against monetary liability:

> The damage the Eleventh Amendment seeks to forestall is that of the state's fisc being subjected to a judgment for compensatory relief. Only if the state is forced to use funds from the state treasury to satisfy a compensatory judgment do the adverse consequences that the Eleventh Amendment prohibits occur.

833 F.2d at 406.

From these premises, the First Circuit concluded that " 'the interests underlying' " the Eleventh Amendment immunity of the states " 'can be adequately vindicated upon an appeal from a final judgment.' " *Metcalf & Eddy, Inc.*, 945 F.2d at 12 (quoting *Libby*, 833 F.2d at 407). The First Circuit thus held that orders denying claims to Eleventh Amendment immunity from suit are not immediately appealable as collateral final orders under *Cohen*. *Id.* at 14.

2. The Conflict Between the Circuits Exists Because the First Circuit Views *Libby* As Controlling.

The conflict between the circuits exists because the First Circuit views *Libby* as controlling precedent.

In *Libby*, the First Circuit held that it lacked jurisdiction to hear the appeal of an interlocutory order denying a claim to Eleventh Amendment immunity raised by state officials who were sued for injunctive relief under 42 U.S.C. § 1983. In Section 1983 cases, however, the Eleventh Amendment does not bar suits seeking injunctive relief against state officials for unconstitutional acts. *Ex Parte Young*, 209 U.S. 123 (1908). This Court has recognized that Section 1983 cases against state officials are a unique exception to the otherwise absolute prohibition of the Eleventh Amendment – an exception that is necessary to insure the supremacy of federal law. *See, e.g., Green v. Mansour*, 474 U.S. 64, 68 (1985).

However accurate the First Circuit's analysis of Eleventh Amendment interests may be in the context of Section 1983 cases when trial must occur, the First Circuit did not limit the holding or the rationale of *Libby* to such cases:

> To posit . . . that the essence of sovereign immunity is an immunity from trial itself, is to overlook the reality of the *Ex Parte Young* exception to the Eleventh Amendment. . . . [B]ecause of *Ex*

> *Parte Young*, a state has to "stand trial" whenever a *Young* type case – a suit against an official in his official capacity to remedy a violation of federal law – is brought against it. . . . Since the state is subjected to this not inconsiderable burden in a *Young* action, it cannot be convincingly argued that the entitlement possessed by the state under the Eleventh Amendment is an entitlement not to stand trial.

833 F.2d at 406.[12]

In the current view of the First Circuit, the Eleventh Amendment does not grant states or state entities an entitlement to be free of trial in federal court.[13]

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12. In the judgment being appealed, the First Circuit explicitly rejected an invitation to limit *Libby* to Section 1983 actions. *Metcalf & Eddy, Inc.*, 945 F.2d at 12 n.4 ("[The Authority] argues that *Libby* is somehow different because Libby's suit was premised on a federal statute, 42 U.S.C. § 1983 (1988), *see Libby*, 833 F.2d at 403, whereas the instant suit is founded upon diversity jurisdiction. We reject the asseveration.").

13. On previous occasions, the First Circuit – and the author of the decision being appealed – recognized that the Eleventh Amendment prohibits the federal courts from entertaining certain lawsuits against states and state entities. *See, e.g, Lane v. First Nat'l Bank*, 871 F.2d 166, 173 (1st Cir. 1989) (Selya, J.) ("If the Eleventh Amendment holds sway,.suit cannot be brought in federal court against an infringing State. . . ."); *Ramirez*, 715 F.2d at 697 (Selya, J., sitting by designation) ("The Eleventh Amendment stands as a palladium of sovereign immunity. It bars federal court lawsuits by private parties insofar as they attempt to impose liability necessarily payable from public coffers. . . ."). The First Circuit did not distinguish these holdings either in *Libby* or in the decision being appealed.

II.
THE DECISION OF THE COURT OF APPEALS FOR THE FIRST CIRCUIT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The decision of the First Circuit conflicts with applicable decisions of this Court holding that the Eleventh Amendment prohibits suits against states and state entities brought by private parties. The decision also conflicts with the recent decisions of this Court recognizing the distinction between immunity from suit and immunity from liability. Finally, the judgment conflicts with this Court's decisions construing the history and purpose of the amendment.

A. The First Circuit's View of the Eleventh Amendment Conflicts with Decisions of This Court Construing the Eleventh Amendment.

The First Circuit's view that the Eleventh Amendment does not provide unconsenting states and state entities with an "entitlement not to stand trial" in the federal courts conflicts with this Court's repeated expressions to the contrary. See, e.g., *Hafer v. Melo*, 112 S. Ct. 358, 364 (1991) ("[T]he Eleventh Amendment bars suits in federal court 'by private parties seeking to impose a liability which must be paid from public funds . . . .' ") (citation omitted); *Howlett v. Rose*, 110 S. Ct. 2430, 2437 (1990) ("The defendant in *Hill* was a state agency protected from suit in federal court by the Eleventh Amendment.") (citations omitted, footnote omitted); *Hoffman v. Connecticut Dep't of Income Maintenance*, 492 U.S. 96, 101 (1989) ("[T]he States' Eleventh Amendment immunity from suit in federal court, which the parties do not dispute would otherwise bar these actions. . . ."); *Dellmuth v. Muth*, 491 U.S. 223, 227 (1989) ("States' constitutionally secured immunity from suit" can be abrogated by Congress only with unmistakable clarity); *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 6 (1989) ("[T]he Eleventh Amendment

rendered the States immune from suits for monetary damages in federal court even where jurisdiction was premised on the presence of a federal question."); *Welch v. Texas Dep't of Highways & Pub. Transp.*, 483 U.S. 468, 479-93 (1987) (explicating constitutional and historical foundation of state sovereign immunity from suit); *Florida Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 684 (1982) ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted); *Pennhurst*, 465 U.S. at 100 ("It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.") (citations omitted); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) (per curiam) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment.").[14]

B. The First Circuit's Judgment Conflicts with Decisions of this Court Holding that *Ex Parte Young* did not Abridge the Eleventh Amendment.

The First Circuit's holding that after *Ex Parte Young* the Eleventh Amendment no longer provides the states with an "entitlement not to stand trial," *Libby*, 833 F.2d

14. Although the history, theoretical basis, relevance, nature and scope of the Eleventh Amendment has been the subject of debate among members of this Court, *see, e.g., Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2586 (1991) (Blackmun, J., dissenting) (citing cases), there has always been complete agreement that the Eleventh Amendment prohibits the federal courts from entertaining diversity actions brought by individuals against unconsenting states and state agencies. *See, e.g., Port Auth. Trans-Hudson v. Feeney*, 110 S. Ct. 1868, 1875 (1990) (Brennan, J., dissenting) ("[T]he Eleventh Amendment secures States only from being haled into federal court by out-of-state or foreign plaintiffs asserting state-law claims, where jurisdiction is based on diversity.").

at 406, conflicts with decisions of this Court to the contrary. This Court has repeatedly held that *Ex Parte Young* made a narrow exception to the Eleventh Amendment's otherwise blanket prohibition of suits against states, and has held that the general prohibition is still the general rule:

> Because of the Eleventh Amendment, States may not be sued in federal court unless they consent to it in unequivocal terms or unless Congress, pursuant to a valid exercise of power, unequivocally expresses its intent to abrogate the immunity. The landmark case of *Ex Parte Young* . . . created an exception to this general principle by asserting that a suit challenging the constitutionality of a state official's action in enforcing state law *is not one against the State*.

Green, 474 U.S. at 68 (citations omitted; emphasis added). *See also Pennhurst*, 465 U.S. at 105 ("[T]he need to promote the supremacy of federal law must be accommodated to the constitutional immunity of the States."); *Pugh*, 438 U.S. at 782 ("There can be no doubt, however, that [this Section 1983] suit against the State and its Board of Corrections is barred by the Eleventh Amendment.").

C. The First Circuit's Decision Conflicts with This Court's Decisions Differentiating Between Immunity from Suit and Immunity from Liability.

The First Circuit's holding that the Eleventh Amendment only protects states and state agencies with an immunity against the enforcement of monetary liability conflicts with this Court's recent cases distinguishing between immunities from suit and immunities from liability.

In *Lauro Lines*, this Court reaffirmed its earlier decisions that an interlocutory order denying a claim to an "immunity from suit" may be appealed as a collateral

final order. 490 U.S. at 500. In holding that the denial of a motion to dismiss based on a contractual forum selection clause did not involve an "immunity from suit," this Court distinguished between "an entitlement to avoid suit" and "an entitlement to be sued only in a particular forum." *Id.* at 501. Unless "an essential aspect of the claim is the right to be free from the burdens of a trial," *Van Cauwenberghe*, 486 U.S. at 525, an order denying a motion to dismiss is not immediately appealable. *Id.* at 526.

The First Circuit's decision misapplies this distinction. Unlike the contractual right granted by a forum selection clause, it is beyond dispute that an "essential aspect" of a constitutional claim to Eleventh Amendment immunity of a state agency is "the right to be free from the burdens of a trial in the federal courts." *See Treasure Salvors*, 458 U.S. at 684 ("A suit generally may not be maintained directly against the State itself, or against an agency or department of the State, unless the State has waived its sovereign immunity.") (citation omitted); *see also Mitchell*, 472 U.S. at 525 ("[T]he essence of absolute immunity is its possessor's entitlement not to have to answer for his conduct in a civil damages action.").

Thus, even though Puerto Rico has allowed the Authority to be sued in the courts of the Commonwealth, P.R. Laws Ann. tit. 22, § 144(c), the Authority is still entitled to claim immunity from suit in federal court under the Eleventh Amendment's constitutional guarantee that trial will not occur in the federal courts. *See, e.g., Pennhurst*, 465 U.S. at 99 n.9 (this "Court consistently has held that a State's waiver of sovereign immunity in its own courts is not a waiver of the Eleventh Amendment immunity in the federal courts.") (citing *Florida Dep't of Health v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam)); *Great N. Life Ins. Co. v. Read*, 322 U.S. 47, 54 (1944).

D. The Decision of the First Circuit Conflicts with Decisions of This Court Construing the History and Purpose of the Amendment.

The decision of the First Circuit holding that the Eleventh Amendment does not bar suits in federal courts conflicts with decisions of this Court construing the history, nature, and purpose of the Amendment. This Court repeatedly has held that the Eleventh Amendment was proposed and ratified to overturn a specific Supreme Court decision that would have permitted the federal courts to entertain such suits.

As this Court has noted, during the debates prior to the ratification of the United States Constitution, the belief prevailed that the judicial power granted in Article III, § 2 (power extends to " 'controversies . . . between a State and Citizens of another State' ") did not encompass suits in which states were unwilling defendants in the federal courts. *See Welch*, 483 U.S. at 479-80 (quoting *Employees v. Missouri Dep't of Pub. Health & Welfare*, 411 U.S. 279 (1973)). In 1793, however, a holder of Revolutionary War bonds sued the State of Georgia in this Court to recover on the bonds. In *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court interpreted the language of Article III, § 2 literally, and held that the private plaintiff could sue the State of Georgia. The Eleventh Amendment was immediately proposed and was ratified both to nullify *Chisholm* and to restore the original understanding that state sovereign immunity precluded the states from becoming unwilling defendants in the federal courts. *Welch*, 483 U.S. at 480 (citing *Employees*, 411 U.S. at 291-92 (Marshall, J., concurring)).

The Eleventh Amendment "embodies a broad constitutional principle of sovereign immunity" which limits the grant of judicial authority contained in Article III. *Id.* at 486. Thus, while the United States may sue states (because that is inherent in the constitutional plan) and

while states may sue other states (because the permanence of the Union otherwise might be endangered), the Eleventh Amendment "established 'an absolute bar' to suits by citizens of other States or foreign states." *Id.* at 487 (citations omitted).

Overlooking the history and specific purpose of the Eleventh Amendment, the decision being appealed cites as controlling authority a decision that limits the Eleventh Amendment to the protection of states against the enforcement of monetary judgments. *Metcalf & Eddy, Inc.*, 945 F.2d at 12 (citing *Libby*, 833 F.2d at 404-07). This view explicitly has been rejected by this Court:

> *Edelman* [*v. Jordan*, 415 U.S. 651 (1974)] did not hold, however, that the Eleventh Amendment never applies unless a judgment for money payable from the state treasury is sought. It would be a novel proposition indeed that the Eleventh Amendment does not bar a suit to enjoin the State itself simply because no money judgment is sought. . . . To adopt the suggested rule, limiting the strictures of the Eleventh Amendment to a suit for a money judgment, would ignore the explicit language and contradict the very words of the Amendment itself.

Cory v. White, 457 U.S. 85, 90-91 (1982).

III.
THIS APPEAL PRESENTS FEDERALISM QUESTIONS OF FUNDAMENTAL CONSTITUTIONAL IMPORTANCE

This appeal presents important questions of federal-state relations and of the proper role of the federal appellate courts in vindicating states' interests guaranteed by the Eleventh Amendment.

In numerous cases this Court has acknowledged the Eleventh Amendment's role as " 'an essential component of our constitutional structure,' " *Blatchford v. Native Village of Noatak*, 111 S. Ct. 2578, 2585 (1991)

(quoting *Dellmuth v. Muth*, 491 U.S. 223, 227-28 (1989)), and the " 'vital role of the doctrine of sovereign immunity in our federal system.' " *Welch*, 483 U.S. at 474 (quoting *Pennhurst*, 465 U.S. at 99). In holding that the Eleventh Amendment does not shield states and their agencies with an "entitlement not to stand trial," the decision being appealed distorts the Eleventh Amendment's role by altering the balance of power between the states and the federal government and its courts.

An essential component of the federal-state balance of power is that the states and their agencies cannot be forced to submit to the jurisdiction of the federal courts for an adjudication of their rights and obligations.[15] States may choose not to submit to any court for the adjudication of such claims, or they may designate their own courts as the sole forum for the resolution of such claims. *See Pennhurst*, 465 U.S. at 99 ("A State's constitutional interest in immunity encompasses not merely *whether* it may be sued, but *where* it may be sued." (footnote omitted)).

On several occasions, this Court has described the essential role that the federal courts play in insuring that this balance of power is preserved and protected. Thus, for example, this Court has required an extraordinarily clear expression of state intent to waive this immunity, *see Edelman*, 415 U.S. at 673, and a similarly clear expression of congressional intent to abrogate the states' Eleventh Amendment immunity. *See Will v. Michigan Dep't of State Police*, 491 U.S. 58, 75 (1989) (Brennan, J., dissenting) ("Where the Eleventh Amendment applies, the Court has devised a clear-statement principle more robust than its requirement of clarity in any other

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15. Madison, Hamilton, and Marshall represented during the ratification debates that the Constitution would *not* abrogate the states' sovereign immunity from suit in the federal courts. This Court has noted that those representations "may have been essential to ratification." *Welch*, 483 U.S. at 483 (footnote omitted).

situation."). The federal courts are required carefully to guard against expansion of their jurisdiction in this traditionally sensitive area. *Welch*, 483 U.S. at 474 (" 'The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation.' " (quoting *American Fire & Casualty Co. v. Finn*, 341 U.S. 6, 17 (1951)).

SUGGESTION FOR SUMMARY DISPOSITION

Because the decision of the Court of Appeals for the First Circuit is clearly erroneous in light of controlling decisions of this Court, and because the facts relevant to this Court's disposition of this jurisdictional question are not in dispute, the Petitioner respectfully suggests that summary disposition of this appeal may be appropriate under Supreme Court Rule 23.1, as in similar cases in the recent past. *See, e.g., Florida Nursing Home Ass'n*, 450 U.S. 147 (per curiam) (certiorari granted as to whether state had waived Eleventh Amendment immunity); *Pugh*, 438 U.S. 781 (per curiam) (certiorari granted with respect to whether suit against state and state prison agency was barred by Eleventh Amendment); *United States v. Hollywood Motor Car Co.*, 458 U.S. 263 (1982) (per curiam) (certiorari granted with respect to whether order denying motion to dismiss based on assertion of prosecutorial vindictiveness is collateral final order).

CONCLUSION

To resolve a direct conflict between the circuits on this important issue of federalism and to restore the proper role of the federal appellate courts in vindicating the right guaranteed by the Eleventh Amendment of state sovereign immunity from suit in the federal courts, this Court should grant the Petition and reverse the error of the First Circuit.

Respectfully submitted on
December 23, 1991

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APPENDICES

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 91-1602

METCALF & EDDY, INC.
Plaintiff, Appellee,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Defendants, Appellant.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Jaime Pieras, Jr., *U.S. District Judge*]

Before Breyer, *Chief Judge,*

Aldrich and Selya, *Circuit Judges.*

Michael T. Brady with whom *Paige E. Reffe, Perry M. Rosen, Cutler & Stanfield, Arturo Trias, Hector Melendez Cano,* and *Trias, Acevedo & Otero,* were on brief for appellant.

Peter W. Sipkins with whom *Dorsey & Whitney, Jay A. Garcia-Gregory,* and *Fiddler, Gonzalez & Rodriguez* were on brief for appellee.

September 25, 1991

Petitioner's Appendix A

SELYA, *Circuit Judge.* We recently acknowledged that "words can be 'chameleons, which reflect the color of their environment.' " *Hanover Ins. Co. v. United States,* 880 F.2d 1503, 1504 (1st Cir. 1989) (quoting *Commissioner v. National Carbide Co.,* 167 F.2d 304, 306 (2d Cir. 1948) (L. Hand, J.)), *cert. denied,* 110 S. Ct. 726 (1990). As the appeal before us illustrates, "immunity" is such a word.

I. BACKGROUND

The Puerto Rico Aqueduct and Sewer Authority (PRASA) was established by the Puerto Rico legislature as "a public corporation and an autonomous government instrumentality." 22 L.P.R.A. § 142 (1987). Its purpose was "to provide to the inhabitants of Puerto Rico . . . adequate drinking water, sanitary sewage service and any other service or facility proper or incidental thereto." *Id.* § 144. In 1985, PRASA and the United States Environmental Protection Agency signed a consent decree which, as later supplemented, required PRASA to bring eighty-three of its facilities into compliance with federal "clean water" standards.

In March 1986, PRASA entered into a contract with Metcalf & Eddy, Inc. (Metcalf), an engineering firm, to provide extensive services anent the subject matter of the consent decree. By late 1990, the relationship had soured. Invoking diversity jurisdiction, 28 U.S.C. § 1332(a) (1988), Metcalf sued PRASA in Puerto Rico's federal district court. Metcalf's suit sought a declaration of rights with respect to the PRASA/Metcalf agreement along with $52,000,000 in damages for breach of contract.

PRASA mounted a furious campaign to avoid joining issue. Its initial motion to dismiss was denied. It then moved to dismiss on the basis of Eleventh Amendment immunity.[1] The district court denied the motion on May

1. The Eleventh Amendment provides in pertinent part that "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State." U.S. Const. amend. IX. It is settled that Puerto Rico is to be treated as a state for Eleventh Amendment purposes. *See, e.g., DeLeon Lopez v. Corporacion Insular de Seguros,* 931 F.2d 116, 121 (1st Cir. 1991); *Ramirez v. Puerto Rico Fire Serv.,* 715 F.2d 694, 697 (1st Cir. 1983).

17, 1991. PRASA appeals from the denial of this motion.[2]

II. APPELLATE JURISDICTION

We begin and end our consideration of this appeal by addressing the threshold question of appellate jurisdiction.

A. Existence of Circuit Precedent

PRASA's appeal hinges, in the first instance, on whether it is properly before us at this early date. Ordinarily, apart from injunctions and other special circumstances, *see, e.g.,* 28 U.S.C. § 1292(a)-(c) (1988), federal appellate courts lack jurisdiction, prior to the entry of final judgment in a given case, to hear appeals from interim trial-court orders. *See* 28 U.S.C. § 1291 (1988). There is, of course, an exception for interlocutory rulings which meet the rigorous collateral-order standards first enunciated by the Supreme Court in *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 545-47 (1949). PRASA contends that its appeal fits within *Cohen's* contours because the Eleventh Amendment renders PRASA "immune" from suit in a federal forum. Thus, PRASA says that the district court's refusal to credit its immunity defense should be reviewable forthwith. In support of its position, PRASA cites a line of cases capped by *Mitchell v. Forsyth,* 472 U.S. 511 (1985). Mitchell holds that interlocutory orders denying state officials the benefit of colorable "qualified immu-

2. In addition to a timely notice of appeal, PRASA also filed a flurry of motions in the district court and in this court seeking to stay the proceedings until its appeal could be heard and determined. No such stay is in effect.

nity" defenses are immediately appealable. *See id.* at 526-27.[3]

The problem with PRASA's position is that the qualified immunity defense available to individual state actors is not, from either a conceptual or a practical standpoint, congruent with the Eleventh Amendment defense available to unconsenting states and state agencies. We said as much in *Libby v. Marshall,* 833 F.2d 402, 404-07 (1st Cir. 1987). There, certain Massachusetts state employees, sued in their official capacities, moved to dismiss on the basis of an asserted Eleventh Amendment immunity. The district court denied their motion. The officials essayed an immediate appeal. After a carefully reasoned analysis of the question, fully considering the *Mitchell* line of qualified immunity cases, see *Libby*, 833 F.2d at 404-05, a panel of this court concluded that "because the interests underlying the immunity the Eleventh Amendment provides to the states can be adequately vindicated upon an appeal from a final judgment . . . the district court's decision [denying the defendants' motion to dismiss was] not a collateral order." *Id.* at 407. Hence, there was no appellate jurisdiction. *Id. Libby* must shape our consideration of PRASA's appeal.[4]

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3. To be sure, other denials of immunity have also been held to be immediately appealable – but these immunities, like qualified immunity, have been personal in nature, comprising an absolute entitlement not to stand trail under given circumstances. *See, e.g., Helstoski v. Meanor,* 442 U.S. 500 (1979) (congressman's immunity under Speech and Debate Clause); *Abney v. United States,* 431 U.S. 651 (1977) (accused's right not to be put twice in jeopardy).

4. PRASA argues that *Libby* is somehow different because Libby's suit was premised on a federal statute, 42 U.S.C. § 1983 (1988), *see Libby,* 833 F.2d at 403, whereas the instant suit is founded upon diversity jurisdiction. We reject the asseveration. It is well settled that an Eleventh Amendment defense, where otherwise applicable, can be asserted in federal question cases as well as in diversity cases. *See, e.g., Edelman v. Jordan,* 415 U.S. 651, 671-74 (1974); *Dube v. State Univ. of N.Y.,* 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied,* 111 S. Ct. 2814 (1991).

B. Effect of Circuit Precedent

Finding, as we do, that *Libby v. Marshall* applies to this appeal, the lens of our inquiry narrows considerably. We have held, with a regularity bordering on the monotonous, that in a multi-panel circuit, newly constituted panels are, by and large, bound by prior panel decisions closely in point. *See, e.g., United States v. Wogan,* ____F.2d ____, ____(1st Cir. 1991) [No. 91-1214, slip op. at 8]; *Kotler v. American Tobacco Co.,* 926 F.2d 1217, 1223 (1st Cir. 1990), *petition for cert. filed* (U.S. March 19, 1991) (No. 90-1473); *Jusino v. Zayas,* 875 F.2d 986, 993 (1st Cir. 1989); *Lacy v. Gardino,* 791 F.2d 980, 985 (1st Cir.), *cert. denied,* 479 U.S. 888 (1986). The orderly development of the law, the need for stability, the value of results being predictable over time, and the importance of evenhanded justice all counsel continue fidelity to this principle.

Of course, there is a two-tiered exception to the rule. The exception has been described in varying terms. We visualize the top tier as becoming operative when, after a panel decision issues, the decision is undercut by controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling. *See, e.g., United States v. Bucuvalas,* 909 F.2d 593, 594 (1st Cir. 1990) (overruling *United States v. Bosch Morales,* 677 F.2d (1st Cir. 1982), in light of *United States v. Powell,* 469 U.S. 57 (1984)); *Unwin v. Campbell,* 863 F.2d 124, 128 (1st Cir. 1988) (overruling in part *Bonitz v. Fair,* 804 F.2d 164 (1st Cir. 1986), in light of *Anderson v. Creighton,* 483 U.S. 635 (1987)); *cf. State of Cal., Dep't of Health Serv. v. United States Dep't of HHS,* 853 F.2d 634, 638-39 (9th Cir. 1988) (refusing to abandon previous decision because language of intervening statutory change, read in context, did not require different result). We foresee the exception's remaining tier as coming into play in those few instances in which newly emergent

authority, although not directly controlling, nevertheless offers a convincing reason for believing that the earlier panel, in light of the neoteric developments, would change its course. *See generally United States v. Connor*, 926 F.2d 81, 83 (1st Cir. 1991) (suggesting that *stare decisis* need not always be applied woodenly, especially where new matters are brought to the court's attention); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987) (discussing "complex relationship . . . between a court and its own previous decisions"); *cf. Aldens, Inc. v. Miller*, 610 F.2d 538, 541 (8th Cir. 1979) ("Although we are not bound by another circuit's decision, we adhere to the policy that a sister circuit's reasoned decision deserves great weight and precedential value."), *cert. denied*, 446 U.S. 919 (1980). In leaving the door to this second tier ajar, however, we emphasize that only the most persuasive showing of collateral authority is likely to possess the power to push the door fully open.

PRASA's argument for overruling *Libby* seeks to take advantage of both aspects of the stated exception. PRASA contends, first, that the Court's decision in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), demands that we abandon our earlier precedent. This contention rests on the appellant's Panglossian reading of *Midland Asphalt* — a reading fueled more by wishful thinking that by legal insights. In *Midland Asphalt*, the Court determined that the denial of a criminal defendant's pretrial motion to dismiss an indictment on account of an alleged violation of Fed. R. Crim. P. 6(e)(2) was not immediately appealable under the collateral-order exception to the final judgment rule.[5] *Id.* at 798-802. Fairly read, the reasoning of *Midland Asphalt* fails to undermine *Libby* in the slightest degree. Indeed, the Court's admonition that litigants seeking to

5. In material part, Fed. R. Crim. P. 6(e)(2) prohibits public disclosure by prosecutors of "matters occurring before the grand jury" except in certain narrowly defined circumstances.

justify interlocutory appeals "must be careful . . . not to play word games with the concept of a 'right not to be tried,' " *id.* at 801, is a warning which PRASA could well have heeded.

The appellant's second salvo is better aimed, but still wide of the mark. Cases from four of our sister circuits hold, contrary to *Libby*, that denials of Eleventh Amendment immunity claims are immediately appealable. *See Kroll v. Board of Trustees of Univ. of Ill.*, 934 F.2d 904, 906 (7th Cir. 1991); *Loya v. Texas Dep't of Corrections*, 878 F.2d 860, 861 (5th Cir. 1989) (per curiam); *Coakley v. Welch*, 877 F.2d 304, 305 (4th Cir.), *cert. denied*, 110 S. Ct. 501 (1989); *Minotti v. Lensink*, 798 F.2d 607, 608 (2d Cir. 1986), *cert. denied*, 482 U.S. 906 (1987). Citing some of these cases, PRASA contends that a tide of emerging authority has engulfed *Libby*, rendering it unworthy of continued deference. We disagree.

Minotti, a case decided prior to *Libby*, was fully considered by the *Libby* panel, *see Libby*, 833 F.2d at 405, and was convincingly rejected. Thus, *Minotti* and the Second Circuit precedents which rest upon it, *see, e.g., Dube v. State Univ. of N.Y.*, 900 F.2d 587, 594 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 2814 (1991), are entitled to no weight as a basis for possible departure from the *Libby* precedent. *Loya* and *Coakley* are horses of a different hue. Both were decided subsequent to *Libby*. Yet, neither opinion offers any meaningful discussion of the pivotal issue; and neither opinion cites *Libby* or addresses its rationale. *Kroll* cites *Libby*, but does not confront its reasoning and advances no cogent analysis to contradict it.

While decisions of other courts of appeals merit our respectful consideration, they are not entitled to our automatic acquiescence. In the end, such decisions should receive deference commensurate with their intrinsic persuasive force (or lack thereof). When, as in this situation, we are asked to overrule a recent, carefully reasoned precedent of our court on the basis of

largely conclusory statements from another court or courts, we should be slow to do so.

In sum, the cases relied upon by PRASA lack the strong persuasiveness needed to change our course. Bluntly put, those cases comprise a trickle rather than a tide. There is simply no principled way that we can jettison *Libby* on so speculative a showing.

III. CONCLUSION

We need go no further. The word "immunity" does not have the talsmanic significance that PRASA attaches to it; and the mere incantation of the term, without reference to the nature and type of immunity involved, does not confer a right to an immediate appeal. Because this case involves a claim of Eleventh Amendment immunity, it comes within the precedential sweep of *Libby* v. *Marshall,* 833 F.2d 402. *Libby* remains unsullied by the passage of time or the march of persuasive authority. Applying binding precedent, as we must, we hold that the district court's denial of a government agency's motion to dismiss premised on Eleventh Amendment grounds is not an immediately appealable order.[6]

The appeal is dismissed for want of appellate jurisdiction. Costs shall be taxed in favor of the appellee.

6. Since we have no jurisdiction over this interlocutory appeal, we do not consider the merits of PRASA's Eleventh Amendment defense and take no view as to whether PRASA is actually entitled to the claimed immunity. That issue is effectively reviewable at the proper time and on the proper record, in the form of an end-of-case appeal prosecuted in the ordinary course.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 90-2261 (JP)

METCALF & EDDY, INC.

Plaintiff

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY

Defendant

ORDER

The Court has before it defendant's Motion for Reconsideration and for Dismissal Under the 11th Amendment to The United States Constitution. The defendant's motion must be denied for the following reasons. Without submission to the Court of a copy of the alleged assignment contract between the plaintiff and its subsidiary, the Court cannot make a finding that the subsidiary is an indispensable party to this action. Fed. R. Civ. P. 19. When a plaintiff brings an action for satisfaction of a contract, it is presumed that it holds the rights to that contract. The defendant has not submitted compelling evidence to the Court which rebuts this presumption. In addition, the defendant is not entitled to Eleventh Immunity in this case because of its ability to raise funds for payment of its contractual obligations which do not affect the Commonwealth's funds. *Mt. Healthy City Bd. of Educ. v. Doyle,* 439 U.S. 274 (1977).

Sanctions will not be imposed upon the defendant for filing of its Motion for Reconsideration, because sanctions should not be imposed for raising serious challenges to subject matter jurisdiction as permitted by the Federal Rules of Civil Procedure. The defendant is

hereby ORDERED to file its answer to the complaint within 20 days of this Order.

IT IS SO ORDERED.

In San Juan, Puerto Rico, this 17th day of May, 1991.

/s/

JAIME PIERAS, JR.
U. S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Misc. No. 91-8042

METCALF & EDDY, INC.,
Plaintiff, Appellee,

v.

PUERTO RICO AQUEDUCT AND SEWER AUTHORITY,
Defendant, Appellant.

Before

Selya, *Circuit Judge,*
Bownes, *Senior Circuit Judge,*
and Cyr, *Circuit Judge.*

ORDER OF COURT

Entered June 28, 1991

Appellee Metcalf & Eddy, Inc.'s ("Metcalf") motion to dismiss appeal is *denied* without prejudice. This denial does not, however, constitute a ruling that this court has jurisdiction over this appeal. The parties shall argue the issue of this court's appellate jurisdiction in their briefs on appeal.

The emergency application for stay of proceedings pending appeal filed by appellant Puerto Rico Aqueduct and Sewer Authority ("PRASA") is *denied.* We cannot say, at this preliminary stage, that PRASA has demonstrated a probability of success on the merits of either the appealability issue or the issue of Eleventh Amendment immunity. Although *Libby v. Marshall,* 833 F.2d 402 (1st Cir. 1987), did involve a suit naming state

officials as defendants, not a state or a state agency, our decision in *Libby* declined to permit an interlocutory appeal because "any immunity enjoyed and any liability risked belong to the state, not to the named defendants as individuals[,]" so that "the concerns . . . as to the pernicious consequences of lawsuits against public officials – inhibiting officials' discretion, distracting them from their duties, deterring people from entering public service – are largely irrelevant." *Id.* at 405. It would seem at first glance, therefore, that the rationale of *Libby* would apply to a suit against a state agency. Furthermore, we stated in *Paul N. Howard Co. v. Puerto Rico Aqueduct and Sewer Authority*, 744 F.2d 880, 886 (1st Cir. 1984), *cert. denied*, 469 U.S. 1191 (1985), that "[w]e doubt that PRASA is sufficiently an arm of the state to qualify for the protection of the Eleventh Amendment." Although this comment was dictum, the doubt expressed on that occasion still lingers. And, it is a substantial doubt.

In addition, PRASA has not demonstrated that it will suffer irreparable injury if the district court proceedings are not stayed. If, indeed, *Libby* governs this case, then any Eleventh Amendment immunity PRASA might enjoy is not "an entitlement not to stand trial." *Libby, supra*, 833 F.2d at 402. Accordingly, PRASA suffers no cognizable irreparable injury by virtue of mere participation in district court proceedings. Furthermore, since Metcalf has offered to stipulate that PRASA's filing of an answer and any counterclaims will not be deemed to constitute a waiver of any Eleventh Amendment immunity enjoyed by PRASA (a concession which we direct Metcalf to place forthwith on the district court record), PRASA need not fear that it will waive any immunity by further participation in the district court proceedings. PRASA has given no adequate reason to doubt that such a stipulation would not be effective. In any case, since PRASA has promptly raised and maintained its claim of Eleventh Amendment immunity, we doubt that PRASA

would be held to have waived any immunity by participation in the district court proceedings or by the filing of compulsory counterclaims. *Cf. Media Duplication Services, Ltd. v. HDG Software, Inc.*, 928 F.2d 1228, 1233 n.2 (1st Cir. 1991) (continued participation in lawsuit, including pursuit of a counterclaim, did not constitute voluntary submission to court's jurisdiction waiving stated objections to personal jurisdiction).

Appellee's motion to dismiss the appeal is *denied* without prejudice. Appellant's emergency application for a stay of proceedings pending appeal is *denied*. Proceedings in this appeal shall be expedited, as follows. Appellant shall serve and file its brief on appeal on or before 5 p.m. on July 29, 1991. Appellee shall serve and file its brief on appeal on or before 5 p.m. on August 23, 1991. Appellant shall serve and file its reply brief on or before 5 p.m. on August 30, 1991.

By the Court:

FRANCIS P. SCIGLIANO, Clerk

By: /s/
Chief Deputy Clerk